

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BARUCHAL LEWIS-SPILLER

Claimant

VS.

CONAGRA FOODS

Respondent

Self-Insured

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Docket No. 1,008,929

ORDER

Respondent appeals the preliminary hearing Order of Administrative Law Judge Bryce D. Benedict dated October 8, 2003. In the Order, claimant was awarded medical treatment with Dwayne E. Jones, M.D., and his referrals. The Administrative Law Judge, in the Order, found that claimant was in need of treatment and respondent had neglected to provide the treatment. Respondent contends that the Administrative Law Judge exceeded his jurisdiction, as respondent had been providing authorized medical treatment for a significant period of time with several health care providers.

ISSUES

- (1) Did the Administrative Law Judge exceed his jurisdiction in awarding claimant medical treatment with a doctor of claimant's choice while refusing to allow respondent to provide a list of three health care providers from which list claimant could choose her treating physician?
- (2) Does the Board have jurisdiction to determine this matter?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence, the Appeals Board (Board) finds this appeal should be dismissed and the Order of the Administrative Law Judge remains in full force and effect.

Claimant suffered accidental injury arising out of and in the course of her employment with respondent on July 2, 2002, when she was struck by the counterweight of a forklift, hitting her back on the right side. Claimant was provided treatment at the

emergency room at Geary Community Hospital, with referrals to several health care providers. She was examined and treated by Chris Edward Wilson, M.D., of the Spinal Institute of Kansas City. Dr. Wilson after reviewing an August 20, 2002 MRI scan, found a central/right eccentric disc bulge at L5-S1, with asymmetry in the position of the descending S1 nerve roots, with slight displacement. He recommended lumbar epidural injections at L5-S1, which were provided. Claimant was placed in physical therapy for several weeks, while continuing to work with restrictions against lifting, pushing or pulling greater than 15 pounds, with no repetitive bending or twisting of the low back and no repetitive overhead reaching.

Claimant underwent three epidural injections at Dr. Wilson's request, with the procedures being performed by Steven Peloquin, M.D., at Mercy Health Center.

After the injections proved to be less than satisfactory, claimant was referred to pain management specialist Dwayne E. Jones, M.D. A discography was performed at L3-4, L4-5 and L5-S1, revealing an annular tear at L5-S1 and a posterior tear at L4-5, with some spread in the epidural space. Dr. Jones recommended intradiscal electrothermal therapy (IDET) at L4-5. However, this is considered an experimental procedure. Claimant was referred by respondent to Stephen J. Reintjes, M.D., of the Kansas City Neurosurgery Group, for an evaluation and recommendation. Dr. Reintjes did not concur with the recommended IDET procedure. He did not have broad experience with this procedure, but, from the experience he did have, he had "not seen anyone get significant improvement with it."¹

Claimant was referred back to Dr. Jones for ongoing pain management and care. Dr. Jones then ordered an FCE and released claimant from his care. Respondent authorized the FCE and further referred claimant to physical medicine and rehabilitation specialist James S. Zarr, M.D., on October 1, 2003. Dr. Zarr reviewed the multitude of medical reports and tests associated with claimant's treatment, including the MRI scan of August 20, 2002, and second MRI scan of June 30, 2003. The June 2003 MRI, while indicating disc degeneration at L5-S1, did not display significant encroachment on the surrounding structures. Dr. Zarr found claimant to have suffered a 3 percent whole body impairment on a permanent basis and returned her to work, restricting her from lifting greater than 25 pounds, with no overhead lifting greater than 20 pounds.

The matter came for preliminary hearing on October 8, 2003, with claimant requesting that she be allowed to pursue the IDET procedure with Dr. Jones.

The Board must first consider whether it has jurisdiction to consider the issue raised. Not every error in law or fact is reviewable from a preliminary hearing order. The Board's

¹ P.H. Trans., Cl. Ex. 1 (medical report of Dr. Reintjes dated June 20, 2003).

jurisdiction to review preliminary hearing orders is generally limited to the following issues, which are deemed jurisdictional:

- (1) Did the worker sustain an accidental injury?
- (2) Did the injury arise out of and in the course of employment?
- (3) Did the worker provide timely notice and timely written claim for the accidental injury?
- (4) Are there any defenses which go to the compensability of the claim?²

Additionally, the Board may review those preliminary hearing orders where it is alleged that a judge has exceeded his or her jurisdiction or authority in granting or denying the benefits requested.³

The Board acknowledges that a somewhat similar issue arose in *Naff*,⁴ where, as here, a dispute arose between the parties as to the appropriateness of medical care. Claimant filed an application for preliminary hearing, disputing respondent's failure to agree to pay for additional post-award medical treatment which had been recommended by claimant's medical expert. A preliminary hearing was held, at which time the administrative law judge ordered respondent to pay for the medical treatment, including the surgery provided by Dr. Lynn Ketchum, claimant's expert. The matter was appealed to the Workers Compensation Board, which dismissed the appeal, finding that it had no jurisdiction to hear such an appeal from a preliminary hearing order, even though the medical request occurred post award. The matter was then appealed to the Kansas Court of Appeals, which, in its decision of January 8, 1999,⁵ remanded the matter to the Board, finding that the post-award Order of the Administrative Law Judge was a final order subject to review by the Board, as the Order in question required respondent to pay for the surgery suggested by claimant's physician, even though it had been rejected by two other

² K.S.A. 44-534a.

³ K.S.A. 2002 Supp. 44-551.

⁴ *Naff v. Davol, Inc.*, No. 204,405, 1997 WL 310395 (Kan. WCAB May 29, 1997). (It should be noted *Naff* occurred before the legislature had created a specific statute establishing a procedure for seeking medical treatment post award. Where no review and modification of the award was sought, but rather just medical treatment, the normal procedure prior to the statutory change was to handle the matter as a preliminary hearing.)

⁵ *Naff v. Davol, Inc.*, No. 79,250 (Kansas Court of Appeals unpublished opinion filed Jan. 8, 1999) (copy attached pursuant to Sup. Ct. Rule 7.04).

physicians. The Court of Appeals went on to find that that type of order could not be considered preliminary in nature and was, therefore, subject to review by the Board.

However, the Board notes that the issue in *Naff* dealt with post-award medical care rather than a pre-award preliminary hearing, as is the case here. Appropriate medical care is not one of the jurisdictional issues listed above which would grant jurisdiction to the Board in reviewing a preliminary hearing order.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.⁶

Here, the Board finds that it does not have jurisdiction to consider the issue raised by respondent and, therefore, the appeal of the respondent in this matter is dismissed and the Award of the Administrative Law Judge shall remain in full force and effect.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Bryce D. Benedict dated October 8, 2003, remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of January 2004.

BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Mark E. Kolich, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Anne Hought, Acting Workers Compensation Director

⁶ *Provance v. Shawnee Mission U.S.D.* No. 512, 235 Kan. 927, 683 P.2d 902 (1984); *Taber v. Taber*, 213 Kan. 453, 516 P.2d 987 (1973); *Allen v. Craig*, 1 Kan. App. 2d 301, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).